No. 95-31

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents James E. Jones, Jr., The Citadel, the Military College of South Carolina ("The Citadel"), and the State of South Carolina, *et al.*, (collectively "respondents") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed on July 10, 1995 by petitioner Shannon Richey Faulkner ("Faulkner").

COUNTERSTATEMENT OF THE CASE

Respondents have today filed their own petition for a writ of certiorari seeking review of the court of appeals' decision. Our petition details the relevant facts of this case. Because Faulkner's statement, however, misstates certain important information concerning the factual and legal background of this case, and in certain important respects mischaracterizes the record, we present a short counterstatement devoted solely to correcting Faulkner's material misstatements and mischaracterizations.

1. Without citing any support in the record, Faulkner asserts that The Citadel's "experts admit that the admission of women would not impair the ability of the college to fulfill its mission." Faulkner Pet. at 25. Although one of respondents' witnesses, General Goodpasteur, acknowledged in a deposition that there would be some beneficial aspects to admitting women to The Citadel, he clearly opposed coeducation of The Citadel because the loss of the benefits of single-sex education outweighed any potential benefits. Deposition of Andrew Goodpasteur at 112, 151. Thus, far from constituting an "admission" that coeducation would not impair fulfillment of The Citadel's missions, General Goodpasteur highlighted the inherent difficulties that would face The Citadel in attempting to fulfill its mission if it were coeducational.[1] In any event, the district court specifically

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[1] To the extent the plaintiffs base their contentions on the testimony of Dr. Richard Richardson, their reliance is misplaced. Dr. Richardson testified that while The Citadel might be able to fulfill one of its missions, such as creating citizen soldiers, if it were coeducational, he correctly pointed out that this

limited the trial in this case to the question whether South Carolina was justified in not offering an all-female military program like The Citadel to women. The district court thus accepted for purposes of the trial proceedings the findings affirmed in the Fourth Circuit's prior decisions in a case involving a virtually identical challenge to the males-only admission policy of the Virginia Military Institute ("VMI"). *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), *petition for cert. filed*, No. 94-1941 (April 23, 1995). Because the district court accepted the Fourth Circuit's findings in *VMI I* and *VMI II* that the substantial pedagogical benefits of single-sex education would be lost if women were admitted to VMI, The Citadel did not offer its own evidence that would have established its inability to fulfill its mission if it were coeducated. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994) (Faulkner Pet. at 34a-36a).

2. Faulkner mischaracterizes the record below by asserting, "The Citadel admits that women could perform just as well as male cadets and would benefit tremendously from its rigorous military-style program." Faulkner Pet. at 4. The testimony of the two witnesses they cite does not support this statement. Norman Doucet, a student at The Citadel, merely acknowledged the obvious

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is not the "exclusive mission" of The Citadel. J.A. 757. Faulkner fails to mention that Dr. Richardson also testified that with coeducation and the changes necessary to accommodate women, The Citadel would "become over time a different place." May 23, 1994 Hearing at 49 (morning session), 75-76 (afternoon session).

fact that women could "handle" minute regulation, challenging academics and a rigorous honor code. J.A. 237. Similarly, Dr. Richardson merely acknowledged that it was not his contention that there were *no* women who could fulfill The Citadel's requirements. In any event, Faulkner's contention ignores the underlying issue, of fundamental importance, that regardless of the ability of females to meet some or all of the requirements of The Citadel, the mere presence of women will destroy the homogeneity of the Corps of Cadets that is necessary to ensure the pedagogical benefits of a single-gender education. To the extent Faulkner is suggesting that it is somehow our position that there are no women who could perform at The Citadel or who would benefit from its program, which we are not asserting, Faulkner simply misses the point.

3. The Petitioner also asserts that the "Commissioner of Higher Education conceded at trial that the exclusion of women from The Citadel violates the state policy of providing equal educational opportunities for women." Faulkner Pet. at 6. Although Robert Gallager, the Commissioner of Higher Education, stated that, in a "narrow sense," J.A. 594, The Citadel's single-gender admissions policy was "somewhat inconsistent," J.A. 604, with the State's policy of providing equal educational opportunity, he made clear that this was merely the inevitable result of the fact that the State has several important educational policies that are at times mutually exclusive, such as offering a wide diversity of programs and responding to student demand in a way that maximizes scarce resources. J.A. 602-605.

4. Faulkner also is incorrect in asserting that "the district court made no finding that South Carolina had a policy of providing single-sex education." Faulkner Pet. at 6. In fact, the district court found that South Carolina follows a policy of diversity in higher education, and that "[d]iversity as the term refers to post-secondary education in South Carolina refers to diversity of educational programs or different kinds and types of programs, including two-year programs versus four-year programs and single-gender versus coeducational." *Faulkner*, 858 F. Supp. at 559 (Faulkner Pet. at 43a).

5. Faulkner also claims that respondents did not offer at trial "any evidence as to the number of women interested in attending a single-sex college." Faulkner Pet. at 6. This statement not only mischaracterizes the record, it ignores the district court's own findings. As we have outlined in our petition for writ of certiorari, the undisputed evidence offered by respondents at trial demonstrated that the current absence of an all-female military program like The Citadel results not from intentional discrimination against women in higher education, but from an absence of any significant demand on the part of women to support such an institutional program. Moreover, the district court found as a fact that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Faulkner*, 858 F. Supp. at 560 (Faulkner Pet. at 46a).

REASONS FOR DENYING THE WRIT

Faulkner's petition is confined to the constitutional adequacy of the *remedy* ordered by the courts below. She seeks review only of the question whether the courts below erred in permitting respondents to remedy the equal protection violation that they found by allowing respondents to provide to women, through the creation of the South Carolina Institute of Leadership for Women ("SCIL"), a publicly supported, single-gender program of undergraduate education with military training, whose classes start this September.[2] Faulkner's petition for writ of certiorari thus seeks review of the same remedial issue raised in the currently pending petition for writ of certiorari filed by the United States on May 26, 1995, in the *VMI* case. Petition for Writ of Certiorari, *United States v. Virginia* (April 23, 1995) (No. 94-1941).

Respondents have on this date filed their own petition for certiorari seeking review of the court of appeals' decision in this case. Unlike Faulkner's petition, however, our petition seeks review, not of the court of appeals' decision on the fact-specific question of the adequacy of the remedy ordered by the courts below, but rather of two issues relating to the court of appeals' decision on liability. Thus, the truly certworthy questions presented

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[2] That Faulkner's petition is limited to this remedial question is also made clear in Faulkner's August 10 Opposition to our Application for Stay pending the filing of our own petition for certiorari: "On July 10, 1995, Shannon Faulkner filed a petition for certiorari seeking review of the remedial aspect of the decision permitting South Carolina to remedy the unconstitutional exclusion of women by creating a separate and intentionally unequal program for women." Opposition at 13.

by this case are: (1) did the courts below exceed their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified; and (2) if the courts below did have jurisdiction over this issue, does a demonstrated and undisputed lack of any demand for an all-female military educational program like The Citadel provide a constitutionally adequate justification for the state's failure to establish such a program. For the reasons set forth in our petition for writ of certiorari, these questions satisfy this Court's standards governing review on writ of certiorari (*see* Rule 10 of the Rules of this Court). The remedial question presented by Faulkner's petition, however, is not worthy of this Court's plenary review. In this regard, we endorse and rely upon the points made by the respondents in the *VMI* case in their Brief in Opposition to the petition for certiorari filed by the United States in that case. *See, e.g.*, Brief for the Commonwealth of Virginia, *et al.* in Opposition, *United States v. Virginia* (June 23, 1995) (No. 94-1941).

CONCLUSION

For the reasons stated herein, Faulkner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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